In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-76

HARPER WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner alleges that there was insufficient independent proof connecting him with the conspiracy to justify the admission against him of extra-judicial declarations of a co-conspirator.

After a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on one count of conspiring to transport forged or altered securities (money orders) in interstate commerce in violation of 18 U.S.C. 371 and 2314. He was sentenced to a term of three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that petitioner conspired with at least ten others to pass altered money orders in the Muncie, Indiana, area. Under the plan, money orders which had been stolen from a Detroit, Michigan, business were

transported to Indiana. The money orders were then imprinted with a monetary amount and distributed to other conspirators who would negotiate them. Petitioner acted as a conduit in the conspiracy: he received stolen money orders and distributed them to fellow co-conspirators who cashed them. The government's evidence against petitioner consisted of the testimony of two of the participants in the conspiracy.

Jane Wray Brann testified that on the evening of November 28, 1972, she met with James Johnson and Keith Johnson and discussed making some easy money (Tr. 137). The following morning Miss Brann again met James Johnson and Keith Johnson and drove them to a house where petitioner was getting into his car (Tr. 141, 160). The two men got out of Brann's car and approached petitioner (Tr. 141-142). The witness described the conversation that followed and what occurred when her two companions returned to her car (Tr. 143):

> A. Keith would say something and kind of shuffle around a little bit, use hand gestures; and then the man would just kind of, you know, nod and not say much; and Keith would talk again and use more hand gestures and shake his head and do things like that; and the man acted like he was thinking. And that was the general gist of what went on.
>
> Q. Did there come a time they came back to the car? [*sic*]
>
> A. Yes, sir.
>
> Q. Who came to the car?
>
> A. Keith and Jimmy.
>
> Q. Did they have anything with them?

A. Yes, sir.

Q. What?

A. Three money orders.

Although Brann admitted that she had not seen the actual exchange of the money orders (Tr. 168-169), she testified that the first occasion on which she saw any of the money orders followed her companions' return to the car (Tr. 169-170). Immediately after the conversation, the two men filled out the money orders, and Brann negotiated them (Tr. 147-148).

Carol Maxine Hilligoss testified that on December 18, 1972, she picked up Keith Johnson, and the two went to obtain more money orders. Johnson directed her to drive to petitioner's house (Tr. 318-319). Mrs. Hilligoss testified as follows (Tr. 320):

Q. Well, did anything happen when you and Keith Albert Johnson reached Grass's [petitioner's nickname] house?

A. He went in for a minute. When he came out, he said he then had the other money orders.

Q. He said?

A. Said that's where he got the money orders; then he had the others.

Q. How many did he have, do you know?

A. Four.

Q. Did you see them at that time, Mrs. Hilligoss?

A. Yes.

After leaving petitioner's house, Keith Johnson filled out the money orders and Hilligoss cashed them (Tr. 321-322).

Petitioner contends that there was insufficient evidence connecting him with the conspiracy to justify the admission against him of the extra-judicial declarations of co-conspirator Keith Johnson. The testimony of Jane Brann and Carol Hilligoss, however, furnished sufficient independent proof of petitioner's participation in the conspiracy as a supplier of blank money orders. On the basis of that testimony, exclusive of Keith Johnson's statements, a jury could reasonably conclude beyond a reasonable doubt that James Johnson and Keith Johnson obtained blank, stolen money orders from petitioner.[1] A conspiracy to distribute altered money orders having been established, and petitioner's participation in the conspiracy haveing been shown independent of the hearsay declarations, Keith Johnson's statements were properly admitted against petitioner under the co-conspirator exception to the hearsay rule. See *Glasser* v. *United States*, 315 U.S. 60, 74.

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[1]There appears to be disagreement among the courts of appeals concerning the proper standard for admissibility of conspirator statements. Compare *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028; *United States* v. *Bey*, 437 F. 2d 188 (C.A. 3); and *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 3), certiorari denied, 377 U.S. 953, with *United States* v. *Martinez*, 466 F. 2d 679 (C.A. 5); *United States* v. *Morton*, 483 F. 2d 573 (C.A. 8); and *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9). There is no need to resolve the disagreement in this case, however, because the independent evidence satisfied even the most stringent of the standards.

In *Panci* v. *United States*, 256 F. 2d 308 (C.A. 5), on which petitioner relies (Pet. 6), the non-hearsay evidence failed to establish the defendant's connection with a conspiracy to violate the narcotics laws. Unlike the situation in the present case, where the evidence exclusive of the hearsay showed that petitioner distributed the money orders to his co-conspirators, there was no testimony in *Panci* that the paper bag the defendant was seen giving to one of the conspirators contained narcotics. The court of appeals in *Panci* thus concluded that the non-hearsay testimony "was wholly insufficient to establish guilt" (256 F. 2d at 312).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2]The court in *Panci* stated in dictum that "in * * * circumstantial evidence cases * * * the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt" (256 F. 2d at 312). Even assuming that the non-hearsay evidence must satisfy a "reasonable doubt" rather than a "preponderance of the evidence" test to warrant the admission of a co-conspirator's hearsay statements (but see note 1, *supra*), the reasonable doubt standard does not require that the evidence exclude all hypotheses inconsistent with guilt. This court held in *Holland* v. *United States*, 348 U.S. 121, that "where the jury is properly instructed on the standards for reasonable doubt," it would be "confusing and incorrect" to give a further instruction that "where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt" (348 U.S. at 139-140).